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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

AUG 23 1993

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of:

Implementation of Sections 11 and 13
of the Cable Television Consumer
Protection and Competition Act of 1992

Horizontal and Vertical Ownership
Limits, Cross-Ownership Limitations
and Anti-Trafficking Provisions

MM Docket No. 92-264

To: The Commission

COMMENTS OF VIACOM INTERNATIONAL INC.

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SUMMARY

Viacom International Inc. ("Viacom"), by its attorneys, hereby submits its comments in response to the Report and Order and Further Notice of Proposed Rule Making in MM Docket No. 92-264, FCC 93-332 (rel. July 23, 1993) (the "FNPRM"). Viacom's comments discuss proposals regarding channel occupancy limits only.

Because the implementation of any channel occupancy limits raises significant constitutional questions, Viacom has urged the Commission to give cable operators broad discretion to select programming of their own choosing. Viacom submits that any standard that would deprive a cable operator of the ability to program a majority of its capacity would, by definition, be excessive and urges the Commission to set the limit on the number of channels that a cable operator can use to carry commonly-owned non-exempt program services at 50% or more of a cable system's activated channels.

Moreover, Viacom urges the Commission to reconsider its decision to delay the establishment of a threshold beyond which the channel occupancy limit would not apply. Various commenters have demonstrated that channel occupancy limits will, as a matter of business necessity, not be needed in a world of increased system capacity because cable operators will be required to obtain programming from unaffiliated programmers. Not only would the imposition of restrictions on speech in this context fail to

withstand constitutional scrutiny, but the failure to establish a threshold in this proceeding will delay the implementation of new technologies that, while not increasing total diversity of voices, would enhance consumer welfare by increasing flexibility to choose among existing (and new) program services.

Viacom also urges the Commission to provide exemptions from the channel occupancy rules for both new and widely-distributed program services. Such exemptions will benefit consumers by allowing vertically-integrated programmers to innovate and create new and different program services.

Viacom supports the Commission's proposals to: (i) apply the channel occupancy rules only to program services under common ownership with the particular cable operator; (ii) include all activated channels in the calculation of channel capacity; (iii) exempt regional and local program services from the channel occupancy rules; (iv) eliminate the channel occupancy limit where effective competition exists; and (v) grandfather existing carriage.

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Viacom International Inc. ("Viacom"), by its attorneys, hereby submits its comments in response to the Report and Order and Further Notice of Proposed Rule Making in MM Docket No. 92-264, FCC 93-332 (rel. July 23, 1993) (the "FNPRM"). The FNPRM solicits comments on various proposals regarding implementation of horizontal and vertical ownership limitations in the cable television industry. In these comments, Viacom will discuss proposals regarding channel occupancy limits only.

In its earlier comments in this proceeding, Viacom urged the Commission to recognize the direct infringement on speech that flows from the imposition of any channel occupancy limit. Comments of Viacom at 2-4. Given the significant constitutional questions raised, Viacom suggested that the Commission give cable operators the broadest possible discretion to select programming

of their own choosing.¹ Viacom believes that, although certain of the proposals set forth in the FNPRM are steps in the right direction, additional measures need to be taken.

I. The Channel Occupancy Limit Should be Set at 50 Percent

In its earlier comments, Viacom proposed that the Commission set the channel occupancy limit so that no more than 50% of a cable system's first 54 activated channels could be devoted to commonly-owned non-exempt program services. See Comments of Viacom at 16-17. The Commission has proposed that the limit be set at 40%. FNPRM at ¶207.

Viacom can only reiterate that the imposition of any channel occupancy limits would raise serious constitutional issues. Accordingly, the Commission should adopt a limit that is no lower than it believes is absolutely necessary to ensure that there is an ample amount of diverse programming available to subscribers. Viacom submits that any standard that would deprive a cable operator of a majority of its capacity would, by definition, be excessive. Accordingly, Viacom urges the Commission to reconsider its proposal and set the limit at 50% or higher.

¹ As before, Viacom's comments here should not be read to mean that Viacom finds that the imposition of any channel occupancy limit would pass constitutional muster. Viacom reserves the right to challenge the constitutionality of the Cable Act and any rules ultimately adopted.

II. The Commission Should Establish, in This Proceeding, a Channel Capacity Threshold Beyond Which the Channel Occupancy Limit Will Not Apply

Viacom also urged the Commission to establish a threshold beyond which the channel occupancy limit would not apply. Comments of Viacom at 15-17. Viacom suggested a 54-channel threshold, which, it believes, will both ensure a high level of diversity of voices and speed the development and implementation of new technologies that will increase system capacity.

Although the Commission continues to support the establishment of a channel capacity threshold, it has tentatively concluded that it is "premature" to establish a ceiling at this time. FNPRM at ¶ 226. Viacom could not disagree more. Far from being premature, the current proceeding is precisely the time to establish such a ceiling.

As demonstrated in Viacom's prior comments, increases in cable system capacity will, as a practical matter, achieve the goals underlying the statutory requirement for channel occupancy limits. Comments of Viacom at 15-16. If nothing else, as a matter of pure business necessity, cable operators will be required to obtain programming from numerous unaffiliated programmers to program the additional channels. Assuming, for the sake of argument, that channel occupancy limits can be constitutionally justified in any circumstance, the imposition of restrictions on speech in this context could not possibly withstand constitutional scrutiny.

Moreover, the Commission must consider that the increased capacity offered by fiber optics and digital signal compression can and likely will be used for more than merely increasing the number of traditional program services carried on a cable system -- although that will be an important aspect of those advances. For example, the additional capacity may be used to offer subscribers increased flexibility in the times during which they can watch a particular program. Currently, a traditional network will run a program once or twice. Subscribers who are unable to watch the program at the scheduled time (or who fail to program their VCRs to record the show) must resign themselves to the fact that the window of opportunity has been missed. Technology, however, offers an opportunity to change that traditional format. Subscribers will be able to select and view a particular program at times that suit their schedules; however, this capability will require the use of additional system capacity. The Commission's decision to delay the adoption of a threshold beyond which the channel occupancy limit would no longer apply will create undue uncertainty among cable operators, causing them to delay implementation of this new technology to the detriment of consumers.²

² For example, Viacom has an interest in StarSight, which is developing technology to allow a subscriber to call up and interact with an on-screen programming guide. StarSight technology will allow subscribers to call up listings of available programming by time of presentation, channel, or program type. A subscriber can then select a desired program or
(continued...)

Accordingly, Viacom strongly urges the Commission to adopt a 54-channel threshold as part of this proceeding. If particular problems present themselves in the future, the Commission will be able to revisit the issue at that time.

III. The Commission Should Provide Exemptions for Both New and Widely-Distributed Program Services

Viacom also urged the Commission to adopt exemptions for both new and widely-distributed program services.³ Comments of Viacom at 4-6, 8-9. The Commission has stated that it does not believe that either exception is "necessary or appropriate."

²(...continued)
program his or her VCR -- by the touch of a button -- to watch or tape for later viewing the desired show. Commission rules should not hinder the development or implementation of any such technology.

On a related front, the Commission asks what provisions should be made "for the use of cable capacity to provide information and communications services as opposed to video programming services." FNPRM at ¶183. As indicated above, advances in technology offer cable operators the opportunity to provide subscribers with many services other than traditional video programming. The Commission should not promulgate rules in this proceeding that would prevent -- or even discourage -- cable operators from exercising their business judgment as to the mix of services (both video and non-video) that best serves the needs and interests of their subscribers. Because there is no indication of any intent on the part of Congress to apply channel occupancy limits to non-video services, any rules adopted by the Commission should ensure that cable operators are not hampered in their delivery of non-video services to their subscribers.

³ As used herein, the term "widely-distributed program service" refers to a program service that is carried by cable systems -- not under common ownership with the programmer -- that serve more than 50% of cable subscribers nationwide (excluding cable subscribers to the commonly-owned systems).

FNPRM at ¶¶ 220-21. Viacom respectfully requests that the Commission reconsider its decision.

With regard to widely-distributed program services, it appears that the Commission has misconceived the nature of Viacom's proposal. The exemption is not needed because of a "risk that such popular programming services will be dropped from cable systems." FNPRM at ¶ 220. Rather, by exempting widely-distributed program services from the channel occupancy limit, the Commission would encourage cable operators, particularly vertically integrated ones, to experiment with new and different program services -- and encourage cable programmers to develop additional program services with a more narrow focus.

The channel occupancy limits are designed to ensure that cable operators do not engage in anti-competitive practices to favor commonly-owned program services at the expense of unaffiliated program services. An exemption for widely-distributed services is appropriate because the decision of the cable operator to carry such program services is not driven by anti-competitive motives. Conversely, including such program services in the channel occupancy limits -- rather than serving the purpose behind the legislation -- can only harm consumers because the cable operator's ability to carry commonly-owned new and innovative programming will be restricted. In sum, exempting widely-distributed program services would enable vertically-integrated cable programmers to continue their historic pattern

of developing innovative programming for subscribers, while ensuring that the cable operator's decision to carry these program services is based on consumer appeal and not anti-competitive intent. Failure to exempt widely-distributed program services would only harm consumers without providing any countervailing benefits.

An exemption for new program services will similarly provide cable operators with the ability to innovate and support the creation of new program services. As discussed above, this can only benefit consumers. Accordingly, Viacom respectfully urges the Commission to reconsider its approach and to adopt exemptions for new and widely-distributed program services.⁴

IV. Limiting Application of the Channel Occupancy Caps to Program Services Under Common Ownership With the Particular Cable Operator is the Proper Result

In the FNPRM, the Commission proposes to apply the channel occupancy limits "only to video programmers that are vertically integrated with the particular cable operator." FNPRM at ¶ 180. Viacom fully supports this approach. The aim of the legislation is to reduce the ability of a cable operator to engage in anti-

⁴ The Commission also asks whether "an exception should be made allowing systems to carry additional affiliated programming where no unaffiliated or competing programmer seeks carriage and channel capacity would otherwise go unused." FNPRM at ¶184. Surely, the public interest is best served by providing subscribers with additional programming, as opposed to requiring a channel to lie fallow. Accordingly, Viacom supports such an exception.

competitive practices. See FNPRM at ¶ 168. As demonstrated in Viacom's prior comments, cable operators simply have no incentive to favor one unaffiliated program service over another. Viacom Comments at 6-9. Thus, the rules are properly limited to carriage by a cable system of those program services that are commonly-owned with that particular cable operator. Such a rule will preclude any potential for anti-competitive behavior without depriving subscribers of a choice of programming. Moreover, the proposed approach will give cable operators greater discretion to choose programming for their subscribers.

V. The Commission Was Correct to Include All Activated Channels, Including All PEG, Leased Access and Broadcast Channels, In the Calculation of Channel Capacity

The Commission also proposes to include all activated channels in the calculation of a system's channel capacity. FNPRM at ¶ 189. Viacom agrees with the Commission that, since PEG, leased access and broadcast channels all increase the diversity of voices on a cable system, "it would be unreasonable to use such channels to reduce the base of channels available for carriage of vertically integrated programming." Id. at ¶ 190. Accordingly, the Commission should adhere to its proposal.

VI. Exempting Regional and Local Program Services from the Channel Occupancy Limit Will Promote Localism

The 1992 Cable Act states that "[a] primary objective and benefit of our nation's system of regulation of broadcast

television is the local origination of programming." See 1992 Cable Act, Section 2(a)(10); see also FNPRM at ¶ 219, n.218. To encourage cable operators to produce local programming, the Commission proposes to exempt regional and local program services from the channel occupancy limit. FNPRM at ¶ 219. Again, Viacom fully supports the Commission's proposals. Including local and regional services in the channel occupancy limit would only discourage cable operators from producing or carrying such programming.

VII. The Channel Occupancy Limit Should Be Eliminated Where Effective Competition Exists

The Commission further proposes to "eliminate channel occupancy limits in any community where effective competition is established." FNPRM at ¶ 231. Again, Viacom supports this proposal. Viacom believes that the limit should be phased out automatically once effective competition is established. Nothing would be served by requiring cable operators and the Commission to engage in a time-consuming and expensive waiver process each time a particular system is subject to effective competition. Rather, the cable operator need only certify to the Commission that effective competition exists. The statutory definition of effective competition should be used to determine whether effective competition exists. As a result, any system not subject to rate regulation would similarly not be subject to the channel occupancy limits. This approach not only ensures that a

diversity of voices will be available to consumers (because consumers will have a choice among competing sources of programming) but will avoid the incongruous result of a competing distributor having access to program services that are unavailable to such program services' commonly-owned cable operator.

VIII. The Grandfathering of Existing Carriage Will Minimize Disruption to Viewers and Programmers

The Commission proposes to allow cable operators to continue to carry any vertically integrated program services carried as of December 4, 1992, even if such grandfathering would result in such operators not being in compliance with the channel occupancy limits ultimately adopted. FNPRM at ¶ 236. Viacom supports this grandfathering approach, which, as the Commission recognizes, will minimize disruption to both viewers and existing programming relationships. Id.

IX. Conclusion

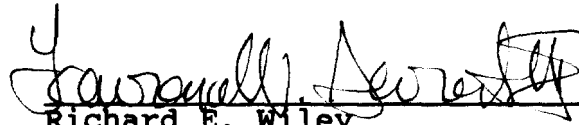
In sum, Viacom urges the Commission to: (i) set the channel occupancy limit no lower than 50% of activated channel capacity; (ii) establish a 54-channel threshold beyond which such limit

would not apply; and (iii) adopt exemptions for both new and widely-distributed program services.

Respectfully submitted,

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